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NO. 91-1057

IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1991

COLIE FOXWORTH,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE OHIO COURT OF APPEALS (EIGHTH JUDICIAL DISTRICT)

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To The Honorable, The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Nothing is said in the Respondent's Brief that in any way

dilutes the thrust of the cogent arguments made on behalf of the petitioner. Of course, the Court should understand that counsel opposite's unwillingness to offer any serious responses to our contentions is deliberate.

Indeed, like prosecutors everywhere, particularly in drug cases, they truly believe the more they say the less room the trial Judges and the Judges on these reviewing courts will have to operate in ruling in their favor.

If it were otherwise, rather than merely endorse positions taken by the Court of Appeals, which were in some instances artificially imputed to the trial Judge or to the prosecutor as the basis for his original offer of

assailed evidence, counsel would have addressed the issues as postured by Foxworth in his Petition.

REPLY TO ARGUMENT NO. I

While the State almost gleefully relies on this Court's decision in **Alabama v. White, ___ U.S. ___, 110 S. Ct. 2412 (1990)**, the new darling in the arsenal of police officers, it could not be clearer why the opinion itself will surely lead to abuse. For as arguably was the case here, the police can always say (whether it is true or not) that they acted on the basis of an anonymous tip which was confirmed by the defendant's appearance or by some aspect of his presence in a particular area.

Indeed, as was the case here, the facts will almost invariably show the

absence of any type of record created before the stop was made that tends to show the anonymous informant even existed or supplied the information attributed to him. This point is made when one realizes the ease with which the asserted tips can be effectively time logged. Cf., Rule 41(c)(2)(D), Federal Rules of Criminal Procedure.

The danger that the asserted informant was really a phantom is further magnified by the fact that where, as here, the accused denies that he consented to a search, it is virtually impossible for a defendant in a drug case to overcome the fact that Judges these days are simply not crediting these denials in drug cases.

Also, with reference to **Alabama v. White**, the facts there are

distinguishable from those here by the fact that Foxworth was a pedestrian when he was stopped and detained. And, it was obvious that he was not in the process of delivering anything to anyone. Indeed, he was walking away from the car that had been lawfully parked on private property. This being so, there is no corroborating fact here for what was said to have been the anonymous-hearsay report that Foxworth would be delivering drugs in the area where he was seen. By contrast to what happened here, in **White** the petitioner was stopped as she headed for the Hotel said to be her destination and she had a described attache case with her. As to Foxworth, it was apparent he was not carrying any contraband. Indeed,

a routine frisk could easily have verified this fact.

REPLY TO ARGUMENT NO. II

The Court of Appeals, in its rush toward affirmance, and indeed counsel opposite in his argument (made for the first time after the Opinion rendered by the Court of Appeals and repeated in this Court), refused to recognize critical flaws in the expressed rationale relied on for rejecting the positions here being urged.

As to the contention that what was supposedly said by the person called by the detective-witness, it should suffice to simply note that if indeed the asserted declarant existed, anything she said would have been irrelevant unless it was intended as an assertion that this Petitioner was

a drug dealer or at least had something to do with illegal drug sales. This being so, it would by definition be inadmissible hearsay under Rule 801(a), Federal Rules of Evidence. Additionally, its admission violated our petitioner's right of confrontation.

Our point here is well made when one distinguishes the facts here from the situation where a police officer answers the phone on the premises during a search being conducted in connection with a gambling raid, and the caller places bets with the officer. See, **United States v. Zenni**, **492 F. Supp. 464, 465-468 (E.D. Ky. 1980)**. Also see **United States v. Oaxaco**, **560 F.2d 518, 525 (9th Cir. 1978)**.

So postured, the conclusion by the appellate court that the officer's testimony that the person he called wanted to purchase drugs perforce was fully intended by the prosecutor to be an assertion of the type prohibited by the Rule. Cf., **United States v. Barash, 365 F.2d 395 (2d Cir. 1966).** In **Barash** the point that seems especially compelling here was made when the Court stated:

> "... proof of a particular fact which is not of itself a matter in issue, but which is relevant only as implying a statement or opinion of a third person on the matter in issue, is inadmissible in all cases where such a statement or opinion not on oath would be of itself inadmissible."

Id., at 399, citing **Wright v. Parke, 112 Eng. Rep. 488, 516-517 (1837).**

Here it should be noted counsel

opposite, while intentionally failing to respond to our contention that the challenged evidence was unadulterated hearsay and was admitted in violation of confrontation rights, also failed to specifically endorse the appellate court's belatedly asserted, artificial, basis for admission. In our judgment, this happened because counsel could not in good conscious make the specious argument that the assailed testimony (even the segment quoted in the Respondent's Brief at p. 13) was not intended as an implied assertion that Foxworth was a drug seller. Indeed, the entire conversation was irrelevant unless it was intended that the jurors should infer from the fact that the caller "wanted to buy narcotics" (ibid) to be

some sort of verification that at least the caller was aware Foxworth sold drugs.

REPLY TO ARGUMENT NO. III

The State's argument, under its designation No. III, seems clearly to reveal still another serious flaw in counsel's ratiocinations with reference to hearsay evidence concepts. For while one can readily agree that evidence offered for purposes other than as proof of the matter asserted may be admitted in spite of the hearsay rule, counsel seemingly feels that this automatically rendered the evidence centralized in this segment of his Brief admissible.

In any event, telling us certain evidence was admissible for a specific

limited purpose is hardly a sufficient response. This follows because counsel for the State never indicated to the trial Judge, as required by Rule 105, Ohio Rules of Criminal Procedure, that the evidence was being offered for some limited purpose. Additionally, there was no necessity here that the State show what caused the police to go to the area where the petitioner was arrested. This fact truly does expose the ulteriorness of the State's original proffer of the assailed evidence.

This being so, repeating the conclusion reached by the Appellate Court that this evidence "was not hearsay ... but merely an explanation of the actions and procedures ... [the police] took subsequent to receiving

[anonymous] information" (Brief In Opposition, p. 15) is really beside the point. What is the point is the fact that the only purpose for which this evidence could possibly serve would be as an implied admission. And, when so considered, a violation of petitioner's right of confrontation occurred.

REPLY TO ARGUMENT NO. IV

The State in its argument on the possession issue verifies the conclusion that counsel must believe this Court can be convinced that one can be convicted of criminal possession of contraband if the proof merely shows they were operating a vehicle in which contraband was found secreted in the trunk. Of course, this Court is yet to make any such ruling.

Simply put then, the issue here being raised is really ripe for a definitive ruling from this Court. Otherwise, all Ohioans will be vulnerable to being victimized by what we are here being told is the Ohio Rule in possession cases of this ilk. Simply put, the Rule the Court would be endorsing holds that one who has dominion or control over a motor vehicle when contraband is located and seized therein is automatically deemed, without more, to have knowledge sufficient to justify a conviction for knowingly possessing such contraband.

As to whether our petitioner was in possession of the car itself when it was searched (whether the search was consented to or not), there is no

dispute. Also, there is no disputing that others also used this car and had used it earlier that day.

Postured by these indisputable facts, even though possession can in some circumstances and situations be proven circumstantially by proof of exclusive dominion, such proof alone is simply not enough to require a possession conviction of contraband found secreted in a car when the proof merely shows the accused was in possession of the car when the secreted contraband was found.

Given the knowledge requirement for a conviction of the possession charge made in this indictment, the absence of any proof to accommodate this element would be dispositive. This is particularly so here since the

State, in arguing that Foxworth consented to the search made, quoted him as having said "I'm clean you can check the car if you want (R. 17)." (Reply Brief., p. 6.) Compare this with the situation in **United States v. Dias-Carreon, 915 F.2d 951 (5th Cir. 1990)**, where the accused stated that "if the truck is loaded, I didn't know about it" (id., at 954). The **Dias-Carreon** court concluded that the "jury could reasonably infer that this ... simple statement, delivered in a rush of anxiety, indicated that Diaz-Carreon knew of the existence of the marijuana in the truck and hoped to divert suspicion from himself" (ibid).

In our judgment this petition gives the Court a rare opportunity to ultimately declare that mere

possession or dominion and control, of a motor vehicle cannot alone support an inference of knowledge of the presence of contraband. See **United States v. Castillo, 524 F.2d 286 (10th Cir. 1975)** and **United States v. Martinez, 514 F.2d 334 (9th Cir. 1975).**

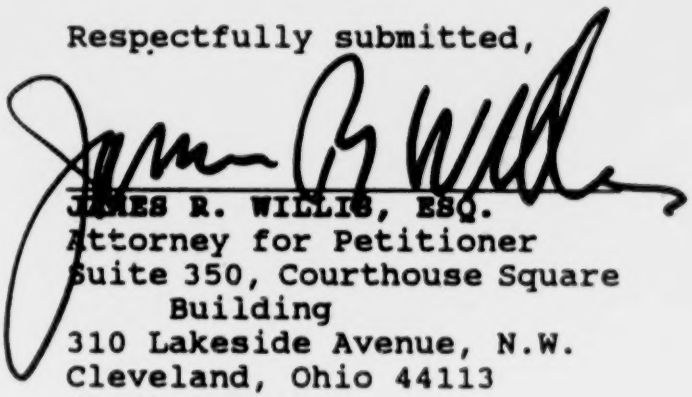
CONCLUSION

This cause should be reviewed to the end that the serious arrest, search and seizure issues in this case can be resolved. Clearly this will require the Court to give us some indication as to the limits beyond which **Alabama v. White** cannot be extended. If there are any such limits, then this case gives the Court an opportunity to say just where the line is drawn.

Also, on the hearsay/confrontation issues in this case, it is doubtful that the Court will find any time soon another case in which such clear-cut issues have been so grossly mishandled by the lower courts.

For these reasons this cause should be reviewed to the end that justice can be done to this petitioner in spite of the Ohio courts.

Respectfully submitted,



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